

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION**

ACTIVEVIDEO NETWORKS, INC.
Plaintiff/Counterclaim-Defendant,
v.

VERIZON COMMUNICATIONS, INC., VERIZON
SERVICES CORP., VERIZON VIRGINIA INC.
AND VERIZON SOUTH INC.
Defendants/Counterclaim-Plaintiffs.

Civil Action No. 2:10-cv-248
RAJ/DEM

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT'S
MOTION FOR JUDGMENT AS A MATTER OF LAW ON INVALIDITY**

Plaintiff Activevideo Networks, Inc. (“ActiveVideo”) respectfully submits this opposition to Defendants Verizon Communications Inc., Verizon Services Corp., Verizon Virginia Inc., and Verizon South Inc. (collectively “Verizon”) Motion for Judgment as a Matter of Law On Invalidity. This issue has already been thoroughly briefed by ActiveVideo in its memorandum in support of its motion for judgment as a matter of law regarding validity of ActiveVideo’s asserted patents (“Memorandum in Support of JMOL Regarding Validity”), [D.E. 860], and in its supplemental brief to the same motion (“Supplemental Brief”). [D.E. 884]

I. Verizon Cannot Meet the Required Clear and Convincing Standard Without Presenting Proper Expert Testimony

ActiveVideo’s asserted patents are “sufficiently complex to fall beyond the grasp of an ordinary layperson,” therefore, the jury must be aided by “expert testimony in order to establish invalidity.” *Proveris Sci. Corp. v. Innovasystems, Inc.*, 536 F.3d 1256, 1267 (Fed. Cir. 2008). For the reasons explained in Memorandum in Support of JMOL Regarding Validity, section III.A, Verizon’s expert, Mr. Schmandt, failed to apply the proper evidentiary standard to his opinion on invalidity, and his testimony was generally void of substantive analysis of the alleged

prior art references. *See also* Supplemental Brief. His testimony, therefore, should be stricken in its entirety. *Id.* As explained by the Federal Circuit

[t]ypically, testimony concerning anticipation must be testimony from one skilled in the art and **must identify each claim element, state the witnesses' interpretation of the claim element, and explain in detail how each claim element is disclosed in the prior art reference.** The testimony is insufficient if it is merely conclusory.

Id. at 1152. (“**General and conclusory testimony . . . does not suffice as substantial evidence of invalidity.**” (emphasis added)).

Therefore, because (i) Mr. Schmandt applied the wrong evidentiary standard in forming his opinion on invalidity and (ii) failed to properly explain his opinion to the jury, the jury cannot rely on Mr. Schmandt’s conclusory testimony to determine the validity of these complex patents. Accordingly, Verizon cannot meet its burden of proof by clear and convincing evidence to invalidate ActiveVideo’s patents.

II. Conclusion

For the foregoing reasons, ActiveVideo respectfully requests that the Court deny Verizon’s motion for judgment as a matter of law.

Dated: July 29, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2011, I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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